No. 96267-7

SUPREME COURT OF THE STATE OF WASHINGTON

JOSE MARTINEZ-CUEVAS and PATRICIA AGUILAR, individually and on behalf of all others similarly situated,
Petitioners,

v.

DERUYTER BROTHERS DAIRY, INC., GENEVA S. DERUYTER, and JACOBUS N. DERUYTER,
Respondents/Cross-Appellants

and

WASHINGTON STATE DAIRY FEDERATION and WASHINGTON FARM BUREAU,
Intervenor-Respondents/Cross-Appellants.

RESPONDENTS'/CROSS-APPELLANTS' MOTION FOR RECONSIDERATION

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I. INTRODUCTION AND IDENTITY OF MOVING PARTY

For more than 60 years, dairy farmers across the state relied on the agricultural exemption to the Minimum Wage Act's overtime requirement. RCW 49.46.130(2)(g) provides that agricultural workers are not entitled to overtime pay. This Court has annulled that provision as applied to dairy workers, concluding that it violates article I, section 12 of the Washington Constitution. Despite this historic change in the law, the Court declined to address whether its decision should apply retroactively as well as prospectively. *See* Slip Op. at 18 n.4. Nonetheless, the Court granted Petitioners attorney fees pursuant to RCW 49.48.030 and RAP 18.1(a).

Without a clear answer from this Court on whether its decision applies only prospectively, Washington farmers face significant uncertainty and potentially devastating financial consequences for their past compliance with the overtime statute. Respondents/Cross-Appellants DeRuyter Brothers Dairy, Inc., Geneva S. DeRuyter, and Jacobus N. DeRuyter (collectively "the DeRuyters") respectfully request that the Court reconsider two narrow aspects of its decision in this case.

First, the Court should reconsider its determination that retroactivity was not properly before it, that the Court did not grant review of that question, and that ruling on retroactivity was not necessary to resolve the case. *See* Slip Op. at 18 n.4. The Court should address the

retroactivity issue and hold that its decision to nullify RCW 49.46.130(2)(g) applies only prospectively. Applying the decision prospectively properly balances the equities. Dairy workers will be eligible for overtime pay, without requiring the farmers who simply followed the law to "bear the overwhelming risk of financial devastation because they paid what the law required of them at the time." *See* Slip Op. at 3 (Johnson, J., separate dissent).

Second, the Court should reconsider its award of attorney fees. Regardless of whether the Court reconsiders its decision on prospective-only application of its ruling, Petitioners have not recovered a judgment for wages owed and are therefore not entitled to attorney fees under RCW 49.48.030.

II. STATEMENT OF RELIEF SOUGHT

The DeRuyters respectfully request that the Court reconsider and amend its opinion in two ways: First, the Court should directly address the issue of prospective-only application of its decision. The Court should hold that its decision invalidating RCW 49.46.130(2)(g) as unconstitutional applies only prospectively. Second, the Court should conclude that Petitioners are not entitled to attorney fees under RCW 49.48.030.

III. STATEMENT OF GROUNDS FOR RELIEF AND ARGUMENT

Since 1959, the Minimum Wage Act has excluded agricultural workers from those employees who are entitled to overtime pay. *See* Laws of 1959, ch. 294 § 1 (excluding agricultural worker from the definition of "employee") & § 3 (overtime for "employees"). Prior to the Court's decision, no case had ever questioned the exemption's validity.

The Court's decision holding the agricultural exemption unconstitutional is a drastic shift in the law. If applied retroactively, the decision will subject Washington's dairy farmers to hundreds of thousands of dollars in liability for overtime worked prior to the Court's decision, notwithstanding the farmers' justifiable reliance on the legislature's determination that they did not have to pay overtime. Prospective-only application of the Court's decision is necessary to avoid a substantially inequitable result.

A. The Issue of Prospective-Only Application Is Properly Before the Court.

The majority expressly declined to address whether the Court's decision would apply retroactively, concluding that "retroactivity is not properly before this court." *See* Slip Op. at 18 n.4. The majority stated that "[n]either party raised this issue in its statement of grounds for review, consequently we did not grant review of it. *See* RAP 2.4(c). Nor is it

necessary to resolve the case. RAP 12.1(b).” *Id.* The majority’s conclusion overlooks the procedural posture of this case as well as this Court’s well-established precedent.

1. The DeRuyters properly raised the issue of prospective-only application.

The majority is correct that no party expressly raised the specific issue of prospective-only application in the statement of grounds for review. While the issue of retroactive/prospective application of a decision was briefed at the Superior Court, the lower court did not rule on it. *See* CP 776–783 (Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment); CP 1050–51 (Plaintiffs’ Reply Memorandum in Support of Motion for Summary Judgment); CP 1202–14 (Order on Plaintiffs’ Motion for Summary Judgment and Intervenors’ Cross Motion for Summary Judgment and Motion to Strike). It would have been premature for the court to do so. The Superior Court *did not rule on the constitutionality of the agricultural exemption*. It held only that RCW 49.46.130(2)(g) “grants a privilege or immunity in contravention of Article I, Section 12 of the Washington constitution” (step 1 of the *Schroeder*[1] 2-part privilege and immunities analysis). CP 1203; *see also* CP 1213–14. The Superior Court concluded that the second part of the test, whether there is a “reasonable basis” for granting the privilege or

[1] *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014).

immunity, raised questions of fact that could not be resolved on summary judgment. CP 1203, 1214.

The DeRuyters then moved for interlocutory review of the Superior Court's decision before Division III of the Court of Appeals. Petitioners moved for direct review to this Court. Because the Superior Court did not decide that the statute was unconstitutional, let alone that such a ruling should be applied retroactively, that specific issue was not presented in the DeRuyters' notice and motion for discretionary review to the court of appeals, filed with Division III on August 17, 2018.[2]

However, the DeRuyters did seek review of the Superior Court's Order on Plaintiffs' Motion for Summary Judgment and Intervenors' Cross Motion for Summary Judgment and Motion to Strike. *See* CP 1215–1232; Motion for Discretionary Review (filed with Division III on August 17, 2018).[3] "After a decision or part of a decision has been identified in the notice of appeal, the assignments of error and substantive argumentation further determine precisely which claims and issues the parties have brought before the court for appellate review." *Clark Cnty. v.*

[2] Because the Superior Court did not issue a *final* judgment, RAP 2.4(c) is inapplicable. *See* RAP 2.4(c) ("Final Judgment Not Designated in Notice.").

[3] This Court's order granting review of Petitioners' motion for discretionary review ordered that, "[t]he Court of Appeals is directed to transfer No. 36258-2-III to this Court for consideration as part of this case. Review of the issue raised in that case is also granted." Order, *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, No. 96267-7 (Feb. 6, 2019).

W. Wash. Growth Mgmt. Hearings Review Bd., 177 Wn.2d 136, 145, 298 P.3d 704 (2013).[4] The DeRuyters' assignment of errors in their Opening Brief specifically identified the issue of prospective application of any decision invalidating the exemption. *See* Opening Br. of Resp'ts/Cross-Appellants at 4. The DeRuyters provided substantive arguments on the issue. *See id.* at 44–49; Resp'ts/Cross-Appellants Reply Br. in Supp. of Cross Appeal at 21–22. And Petitioners had an opportunity to respond. Petr's Reply and Response to Cross-Appeal at 40–41.

Even if the DeRuyters should have specifically identified the issue of prospective-only application in their motion, they properly presented the issue for this Court's consideration by specifically identifying it in their statement of errors and by presenting argument on the matter in their opening brief. Consequently, the issue was properly before the Court. *See Clark Cnty.*, 177 Wn.2d at 144 ("court will consider issue on appeal, notwithstanding technical violation of procedural rules, when nature of challenge has been made clear without prejudice to opposing party" (describing *State v. Olson*, 126 Wn.2d 315, 318–24, 893 P.2d 629 (1995));

[4] While these legal principles announced in *Clark County* are applicable to this case, the facts are distinguishable. Unlike *Clark County*, this is not a case where the issue was decided below and the DeRuyters failed to appeal it. *See Clark Cnty.*, 177 Wn.2d at 143, 147 (holding "[t]he Court of Appeals erred by adjudicating claims that were resolved below [by stipulation, dismissal, and reversal], were not raised on appeal, and remained separate and distinct from the claims that the parties raised on appeal"). As explained, the Superior Court did not reach the issue of prospective-only application of any decision invalidating the agricultural exemption.

SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 138 n.4, 331 P.3d 40 (2014) ("[t]he technical failure to assign error on appeal does not waive an issue that is clearly argued in the briefs").

2. By holding that the agricultural exemption is unconstitutional, the majority made a determination of prospective application necessary.

Even if, for argument's sake, the issue was not originally before the Court, it became necessary for the Court to rule on the issue of prospective-only application when it held that the agricultural exemption is unconstitutional. *See* RAP 12.1(b); *cf.* RAP 2.4(a) ("The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review . . . if demanded by the necessities of the case."). In *Lunsford v. Saberhagen Holdings, Inc.*, this Court held:

> [T]he decision to apply a new rule prospectively *must be made* in the decision announcing the new rule of law. It is at that point—when we are engaged in weighing the relative harms of affirming or overruling precedent—that courts are in the best position to determine whether a new rule should apply retroactively or prospectively only. It is then that we will employ any balancing of the equities deemed necessary.

166 Wn.2d 264, 279, 208 P.3d 1092 (2009) (emphasis added) (internal citations omitted); *see also id.* at 287 (Madsen, J., concurring) ("the majority says [prospective application] must be determined in the very same case in which the rule is announced").

Three years later, the Court reiterated this holding, stating "[i]n *Lunsford*, we unequivocally held that '[b]y its very nature, the decision to apply a new rule prospectively must be made in the decision announcing the new rule of law.'" *Jackowski v. Borchelt*, 174 Wn.2d 720, 731, 278 P.3d 1100 (2012) (quoting *Lunsford*, 166 Wn.2d at 279).

Even aside from *Lunsford* and *Jackowski*, it is well established that the Court has "inherent authority to consider issues not raised by the parties if necessary to reach a proper decision." *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wn.2d 424, 429, 759 P.2d 427 (1988); *see also, e.g.*, *City of Seattle v. McCready*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994). The Court is "allowed to consider and apply 'a constitutional mandate, a statutory commandment, or an established precedent' not raised by the parties when 'necessary for decision.'" *Clark Cnty.*, 177 Wn.2d at 147 (quoting *McCready*, 123 Wn.2d at 269). Having held unconstitutional a statute that had prominently governed Washingtonians' economic affairs for 60 years, it became necessary for the Court to decide whether its decision would apply retroactively—imposing massive liability on the DeRuyters and other farmers who had justifiably relied on the law (and the Department of Labor's published guidance about it)—or whether it would apply only prospectively.

B. To Promote Judicial Economy and Serve the Ends of Justice, the Court Should Determine Whether Its Decision Applies Retroactively or Only Prospectively.

Ultimately, the Court has inherent authority "to determine whether a matter is properly before the court, to perform those acts which are proper to secure fair and orderly review, and to waive the rules of appellate procedure when necessary 'to serve the ends of justice.'" *State v. Aho*, 137 Wn.2d 736, 740–41, 975 P.2d 512 (1999) (quoting RAP 1.2(c)); *see also* RAP 1.2(c) ("[t]he appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice"). The Court may raise and decide issues *sua sponte*. *See, e.g.*, *Conard v. Univ. of Wash.*, 119 Wn.2d 519, 528, 834 P.2d 17 (1992) (noting the Court of Appeals raised the due process issue *sua sponte* presumably because it found in its discretion "the issue 'should be considered to properly decide [the] case'" (citing RAP 12.1(b)); *Aho*, 137 Wn.2d at 740–41 (concluding *sua sponte* the case raised a due process rather than an ex post facto question and addressing the due process violation). Addressing whether this decision applies prospectively furthers the goals of judicial economy and serves the ends of justice.

Determining retroactive/prospective application is "necessary to resolve actual and residual disputes between [the] parties," and decreases the likelihood of future appeals. *Clark Cnty.*, 177 Wn.2d at 146. The

majority states that "no further issues remain for the trial court to resolve." Slip Op. at 19. But the issue of whether the decision applies retroactively or prospectively, and thus whether the DeRuyters are liable for overtime payments, is outstanding. Remanding to the Superior Court without making this determination leaves open the possibility of additional appeals specifically on this issue. Addressing the issue now may curtail future appeals, thus serving the interests of judicial economy. *See Kruse v. Hemp*, 121 Wn.2d 715, 721, 853 P.2d 1373 (1993) (although the parties raised only the appeal waiver and attorney fee issues, and requested that the Court remand to the Court of Appeals for consideration of the substantive claim, the Court addressed the substantive claim, concluding that "[w]e find that efficiency will be served and further appeals curtailed by this court's resolution of the specific performance issue"); *cf. Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380–81, 46 P.3d 789 (2002) (holding it was error for the Court of Appeals to have declined review of the motion to dismiss, but stating "[r]ather than remanding to the Court of Appeals for a determination on the dismissal, we will resolve the outstanding issues in the interest of judicial economy").

Similarly, deciding whether the Court's decision applies only prospectively will give other interested parties and potential litigants

much-needed clarity. If the Court determines its decision applies only prospectively, the Court will save Washington workers and employers the cost of lawsuits which may ultimately be fruitless. If, however, the Court determines that the decision will be applied retroactively, that clarity may encourage settlement between employers and workers claiming entitlement to overtime pay. So long as the question is outstanding, there is little incentive to settle. In either case, leaving the issue open will increase costs for everyone and further burden the courts.

Determining the retroactivity of the decision immediately will "eliminate uncertainty [and] confusion." *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 780, 785, 567 P.2d 631 (1977) (holding prospectively "that judgments are liens upon the interest of a real estate contract purchaser within the meaning of" judgment lien statutes). The Court should exercise its inherent authority and decide this issue.

C. The Court's Decision Should Apply Only Prospectively.

The Court's decision overturns a law that farmers relied on in good faith for decades. Relying on this statutory exemption, the DeRuyters—like other farmers—did not pay their dairy workers overtime. At the time, this was entirely lawful, and the DeRuyters had no reason to question the statute. If the Court's decision applies retroactively, the DeRuyters and

others will suddenly be liable for hundreds of thousands of dollars in overtime pay they could not have anticipated.

The DeRuyters appreciate that ordinarily the Court's decisions are applied both retroactively and prospectively. *See McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 75, 316 P.3d 469 (2013). However, this Court has repeatedly recognized the propriety of prospective-only application when its decision announces new law or overrules existing precedent and retroactive application "may result in substantial hardships to the parties who have relied in good faith on the rule." *Cascade Sec. Bank*, 88 Wn.2d at 784. That is certainly the case here. "Prospective application minimizes or eliminates the hardships of an overruling decision." *Id.* at 785. The DeRuyters urge the Court to recognize that the Court should give this decision "prospective-only application to avoid substantially inequitable results." *McDevitt*, 179 Wn.2d at 75.

"[T]he doctrine of prospective overruling has attached in many areas," including constitutional law. *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 673, 384 P.2d 833 (1963). "It enables the law under stare decisis to grow and change to meet the ever-changing needs of an ever-changing society and yet, at once, to preserve the very society which gives it shape." *Id.* Prospective overruling "enabl[es] the courts to

right a wrong without doing more injustice than is sought to be corrected." *Id.* at 666.

The Court "may choose to give a decision prospective-only application" when the following conditions are met:

> "(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed, (2) retroactive application would tend to impede the policy objectives of the new rule, and (3) retroactive application would produce a substantially inequitable result."

McDevitt, 179 Wn.2d at 75 (quoting *Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 448, 546 P.2d 81 (1976)).

Each of these conditions is met in this case. Accordingly, the Court should hold that its decision invalidating RCW 49.46.130(2)(g) as applied to dairy workers applies only going forward.

1. The decision establishes a new rule of law, overruling a decades-old exemption.

Since its passage in 1959, the Minimum Wage Act has exempted agricultural workers from its overtime provisions. *See* Laws of 1959, ch. 294 § 1 (excluding agricultural worker from the definition of "employee") & § 3 (overtime for "employees"). For more than 60 years as the law of this state, the exemption's validity has never seriously been in doubt.

Nor is there any serious dispute that the Court's decision announces a new rule of law that was not foreshadowed. Petitioners

conceded as much at the Superior Court: "Plaintiffs acknowledge that a decision overturning an exemption from overtime pay for farm workers would establish a new rule of law." CP 1050 (Plaintiffs' Reply Memorandum In Support of Motion for Summary Judgment).

2. Retroactive application of the Court's decision will not further its purpose.

In evaluating the second condition, the court "must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Taskett*, 86 Wn.2d at 448 (omission in original) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 296, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971)).

"The stated purpose of the Minimum Wage Act is to protect the health and safety of Washington workers, as required by article II, section 35." Slip Op. at 17. "[M]inimum wage laws have a remedial purpose of protecting against the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (internal quotation marks omitted).

Retroactive application of the majority's decision, however, will not protect against the "evil" of long hours already worked. It will not

further the "health and safety" of the dairy workers to now compensate them beyond what they received and expected they would receive. These hours were worked at a time when the dairy workers had no expectation that they would receive overtime. Nor can retroactive application act as a "deterrent" against past practices or events that have already occurred. The work has already been completed. *Cf. Linkletter v. Walker*, 381 U.S. 618, 637, 85 S. Ct. 1731 (1965) (rule whose purpose was "to deter the lawless action of the police and to effectively enforce the Fourth Amendment" would not be served by retroactive application); *Nat'l Can Corp. v. Dep't of Revenue*, 109 Wn.2d 878, 888, 749 P.2d 1286 (1988) ("It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past . . . ."), *overruled by Digital Equip. Corp. v. Dep't of Revenue*, 129 Wn.2d 177, 916 P.2d 933 (1996).[5] Retroactive application of a dramatic change in Washington law should not be employed to achieve a substantial monetary reallocation between the private parties to an economic relationship, particularly when the party who will be effectively penalized by retroactive allocation was simply following the law.

[5] Although *National Can* was overruled in light of controlling Supreme Court precedent, this Court did not reject or modify the underlying analysis. *See Digital Equip. Corp.*, 129 Wn.2d at 188.

Applying the decision prospectively, on the other hand, will not retard the effectiveness of the Court's decision. Moving forward, dairy workers will be entitled to overtime pay. This is a substantial benefit to them if they do work overtime and may discourage farmers from having their employees work overtime.

3. Retroactive application of the Court's decision would produce substantially inequitable results.

Finally, the court must "weigh[] the inequity imposed by retroactive application, for (w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." *Taskett*, 86 Wn.2d at 448 (quoting *Chevron Oil Co.*, 404 U.S. at 107 (internal quotation marks omitted)).

Applying the Court's decision retroactively produces a substantially inequitable result for the DeRuyters and for the hundreds of Washington dairy farmers who were relying on the law of this state. As Justice Johnson explained, "[t]he cost of paying overtime for hours worked in the past could have a devastating impact on farm employers broadly." Slip Op. at 3 (Johnson, J., separate dissent). The DeRuyters are proof that Justice Johnson's concern is well founded. They are facing hundreds of thousands of dollars in payments for overtime worked in the

past, on a farm that they no longer own, for the *sole reason* that they followed the law. This decision is likely to impact the agriculture industry across the state, including the 94% of Washington farms that are small farms, selling less than $250,000 per year. *See* CP 900.

This Court and courts around the country have applied their decisions prospectively where retroactive application might result in great financial hardship after "justifiable reliance on a statute which is presumptively constitutional." *Bond v. Burrows*, 103 Wn.2d 153, 163–64, 690 P.2d 1168 (1984) (collecting cases); *id.* at 164 (holding that decision invalidating lower tax rate for border counties as unconstitutional would be given prospective effect, noting "[r]etroactive application of the present decision would impose substantial hardship on the retailers in the border counties [that relied on the lower tax rate]. We will not impose such a burden upon the retailers that cannot legally be passed on to the buyers."); *Cascade Sec. Bank*, 88 Wn.2d at 785 ("To apply our decision to the parties would defeat respondents' reliance interest and cause them considerable financial loss. We refuse to allow our decision to operate on the parties in this appeal.").

The DeRuyters—and dairy farmers across the state—followed a law that the legislature validly passed. If the Court applies its decision retroactively, the *DeRuyters* will be made to pay for the *legislature*'s

mistake in passing an unconstitutional law six decades ago. *Cf. Allis-Chalmers Corp. v. City of N. Bonneville*, 113 Wn.2d 108, 119, 775 P.2d 953 (1989) (explaining that retroactive application was appropriate in part because, unlike in *Bond*, "[t]here is in this case no group of third parties (the retailers in *Bond*) who would suffer an unfair and substantial hardship upon retroactive application of our decision"). Requiring the DeRuyters to bear the burden for the legislature's actions would be a "substantially inequitable outcome." *McDevitt*, 179 Wn.2d at 76 (concluding that retroactive application would "in effect, punish [respondent's] reliance on our recent decision: a substantially inequitable outcome").

Applying the Court's decision only prospectively strikes the proper balance of equities: Dairy workers will get overtime pay. The DeRuyters and other farmers will not have to bear "the overwhelming risk of financial devastation because they paid what the law required of them at the time." Slip Op. at 3 (Johnson, J., separate dissent).

D. Petitioners Have Not Recovered a Judgment for Wages Owed and Are Therefore Not Entitled to Attorney Fees.

The majority awarded Petitioners attorney fees pursuant to RCW 49.48.030 and RAP 18.1(a). *See* Slip Op. at 18. RCW 49.48.030 awards reasonable attorney fees to a person who is "successful in recovering judgment for wages or salary owed to him or her." Regardless of whether

the Court reconsiders its decision on prospective-only application of its ruling, Petitioners have not yet recovered a judgment for wages owed. They are therefore not entitled to attorney fees under the statute. *See Karstetter v. King Cnty. Corrs. Guild*, 193 Wn.2d 672, 686, 444 P.3d 1185 (2019) (denying request for attorney fees where petitioner "has not recovered any judgment for wages or salary owed to him"); *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 726, 81 P.3d 111 (2003) (denying request for attorney fees where petitioner had "yet to obtain a judgment for lost wages").

If the Court concludes its decision applies only prospectively, Petitioners will not recover a judgment for wages owed. They will not be entitled to attorney fees under RCW 49.48.030.

The Court should reconsider the portion of its decision awarding Petitioners attorney fees and deny Petitioners' request.

IV. CONCLUSION

For the reasons stated above, the Court should reconsider its opinion and (1) hold that its decision applies prospectively only; and (2) hold that Petitioners are not entitled to attorney fees.

RESPECTFULLY SUBMITTED this 25th day of November, 2020.

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